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AMENDED IN SENATE MAY 27, 2014

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## **SENATE BILL**

**No. 980**

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**Introduced by Senator Lieu  
(Coauthor: Senator Leno)**

February 11, 2014

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An act to amend Sections 1405 and 1417.9 of, and to add Section 1405.1 to, the Penal Code, relating to DNA testing.

### **LEGISLATIVE COUNSEL'S DIGEST**

SB 980, as amended, Lieu. Prisoners: DNA testing.

(1) Existing law allows an incarcerated person who has been convicted of a felony to make a written motion for the performance of forensic deoxyribonucleic acid (DNA) testing according to a specified procedure. Existing law allows the court to order a hearing on the motion in the court's discretion.

This bill would instead allow the court to order a hearing on the motion if the court determines the convicted person has met specified requirements and that the hearing is necessary. This bill would, upon request of the convicted person or the convicted person's counsel, allow a court to order the prosecutor to make all reasonable efforts to obtain, and police agencies and law enforcement laboratories to make all

reasonable efforts to provide, copies of DNA lab reports, copies of evidence logs, and other specified documents.

(2) Existing law requires notice of a motion for DNA testing to be served on the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be retested. Existing law requires the response, if any, to be filed within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause.

This bill would extend the time for filing a response to 90 days. The bill would also allow either party to request an additional 60 days to brief certain specified issues.

(3) Existing law requires a court to grant the motion for DNA testing if it determines, among other things, that the *convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted persons' identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction and that the requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction.*

This bill would state that ~~the defendant~~ *the convicted person is only required to demonstrate that the DNA testing would be relevant to rather than dispositive of, the issue of identity and is not required to show that a favorable test result would conclusively establish his or her innocence before the court may grant a motion for DNA testing. The bill would prohibit a court, in determining whether the convicted person is entitled to develop potentially exculpatory evidence, from deciding whether the requested DNA testing results, assuming a DNA test result favorable to the defendant convicted person, would ultimately require he or she is entitled to some form of ultimate relief from the conviction.*

If the court grants a motion for DNA testing and a profile of an unknown contributor is generated, the bill would allow the court to conduct a hearing to determine if the DNA profile should be uploaded into the State Index System, and if appropriate, the Federal DNA Index System, if certain conditions are met, as specified.

The bill would revise the requirements that a laboratory is required to meet in order to conduct testing pursuant to a motion for DNA retesting, as specified.

(4) Existing law requires the appropriate governmental entity to retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with the case. Existing law allows the governmental entity to dispose of biological material before the expiration of this time period if the governmental entity notifies the inmate and his or her counsel, and the notifying entity does not receive, within 90 days of sending the notification, a motion for DNA testing, a request that the material not be destroyed because a motion for DNA testing will be filed within 180 days, or a declaration of innocence that has been filed with the court within 180 days of the judgment of conviction.

This bill would allow the governmental entity to dispose of biological material before the expiration of the time that the person remains incarcerated in connection with the case if the governmental entity notifies the inmate and his or her counsel, and the notifying entity does not receive, within ~~one year~~ 180 days of sending the notification, a motion for DNA testing, a request that the material not be destroyed because a motion for DNA testing will be filed within one year, or a declaration of innocence that has been filed with the court within one year of the judgment of conviction. By increasing the duties of local governmental entities in regard to the retention of biological material, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 1405 of the Penal Code is amended to  
2 read:

3 1405. (a) A person who was convicted of a felony and is  
4 currently serving a term of imprisonment may make a written  
5 motion, pursuant to subdivision (d), before the trial court that

1 entered the judgment of conviction in his or her case, for  
2 performance of forensic deoxyribonucleic acid (DNA) testing.

3 (b) (1) An indigent convicted person may request appointment  
4 of counsel in order to prepare a motion pursuant to subdivision (d)  
5 by sending a written request to the court. The request shall include  
6 the person's statement that he or she was not the perpetrator of the  
7 crime and shall explain how the DNA testing is relevant to his or  
8 her assertion of innocence. The request also shall include the  
9 person's statement as to whether he or she previously has had  
10 counsel appointed under this section.

11 (2) If any of the information required in paragraph (1) is missing  
12 from the request, the court shall return the request to the convicted  
13 person and advise him or her that the matter cannot be considered  
14 without the missing information.

15 (3) (A) Upon a finding that the person is indigent, he or she  
16 has included the information required in paragraph (1), and counsel  
17 has not previously been appointed pursuant to this subdivision,  
18 the court shall appoint counsel to investigate and, if appropriate,  
19 to file a motion for DNA testing under this section and to represent  
20 the person solely for the purpose of obtaining DNA testing under  
21 this section.

22 (B) Upon a finding that the person is indigent, and counsel  
23 previously has been appointed pursuant to this subdivision, the  
24 court may, in its discretion, appoint counsel to investigate and, if  
25 appropriate, to file a motion for DNA testing under this section  
26 and to represent the person solely for the purpose of obtaining  
27 DNA testing under this section.

28 (4) This section does not provide for a right to the appointment  
29 of counsel in a postconviction collateral proceeding, or to set a  
30 precedent for any such right, in any context other than the  
31 representation being provided an indigent convicted person for the  
32 limited purpose of filing and litigating a motion for DNA testing  
33 pursuant to this section.

34 (c) Upon request of the convicted person or convicted person's  
35 counsel, the court may order the prosecutor to make all reasonable  
36 efforts to obtain, and police agencies and law enforcement  
37 laboratories to make all reasonable efforts to provide, the following  
38 documents that are in their possession or control, if the documents  
39 exist:

1 (1) Copies of DNA lab reports, with underlying notes, prepared  
2 in connection with the laboratory testing of biological evidence  
3 from the case, including presumptive tests for the presence of  
4 biological material, serological tests, and analyses of trace  
5 evidence.

6 (2) Copies of evidence logs, chain of custody logs and reports,  
7 including, but not limited to, documentation of current location of  
8 biological evidence, and evidence destruction logs and reports.

9 (3) If the evidence has been lost or destroyed, a custodian of  
10 record shall submit a report to the prosecutor and the convicted  
11 person or convicted person's counsel that sets forth the efforts that  
12 were made in an attempt to locate the evidence. If the last known  
13 or documented location of the evidence prior to its loss or  
14 destruction was in an area controlled by a law enforcement agency,  
15 the report shall include the results of a physical search of ~~the~~ *this*  
16 area. *If there is a record of confirmation of destruction of the*  
17 *evidence, the report shall include a copy of the record of*  
18 *confirmation of destruction in lieu of the results of a physical*  
19 *search of the area.*

20 (d) (1) The motion for DNA testing shall be verified by the  
21 convicted person under penalty of perjury and shall include all of  
22 the following:

23 (A) A statement that he or she is innocent and not the perpetrator  
24 of the crime.

25 (B) Explain why the identity of the perpetrator was, or should  
26 have been, a significant issue in the case.

27 (C) Make every reasonable attempt to identify both the evidence  
28 that should be tested and the specific type of DNA testing sought.

29 (D) Explain, in light of all the evidence, how the requested DNA  
30 testing would raise a reasonable probability that the convicted  
31 person's verdict or sentence would be more favorable if the results  
32 of DNA testing had been available at the time of conviction.

33 (E) Reveal the results of any DNA or other biological testing  
34 that was conducted previously by either the prosecution or defense,  
35 if known.

36 (F) State whether any motion for testing under this section  
37 previously has been filed and the results of that motion, if known.

38 (2) Notice of the motion shall be served on the Attorney General,  
39 the district attorney in the county of conviction, and, if known, the  
40 governmental agency or laboratory holding the evidence sought

1 to be tested. Responses, if any, shall be filed within 90 days of the  
2 date on which the Attorney General and the district attorney are  
3 served with the motion, unless a continuance is granted for good  
4 cause.

5 (e) If the court finds evidence was subjected to DNA or other  
6 forensic testing previously by either the prosecution or defense, it  
7 shall order the party at whose request the testing was conducted  
8 to provide all parties and the court with access to the laboratory  
9 reports, underlying data, and laboratory notes prepared in  
10 connection with the DNA or other biological evidence testing.

11 (f) If the court determines that the convicted person has met all  
12 of the requirements of subparagraphs (A) to (F), inclusive, of  
13 paragraph (1) of subdivision (d), the court may, as it deems  
14 necessary, order a hearing on the motion. The judge who conducted  
15 the trial, or accepted the convicted person's plea of guilty or nolo  
16 contendere, shall conduct the hearing unless the presiding judge  
17 determines that judge is unavailable. Upon request of either party,  
18 the court may order, in the interest of justice, that the convicted  
19 person be present at the hearing of the motion. Either party, upon  
20 request, may request an additional 60 days to brief issues raised  
21 in subdivision (g).

22 (g) ~~In determining whether to grant testing, the court shall not~~  
23 ~~decide whether the requested DNA testing results, assuming a~~  
24 ~~DNA test result favorable to the convicted person, would ultimately~~  
25 ~~require some form of relief from the conviction. In addition, before~~  
26 ~~the granting of a motion for DNA testing pursuant to this section,~~  
27 ~~the convicted person is not required to show that a favorable test~~  
28 ~~would conclusively establish his or her innocence. Rather, the~~ *The*  
29 court shall grant the motion for DNA testing if it determines all  
30 of the following have been established:

31 (1) The evidence to be tested is available and in a condition that  
32 would permit the DNA testing requested in the motion.

33 (2) The evidence to be tested has been subject to a chain of  
34 custody sufficient to establish it has not been substituted, tampered  
35 with, replaced, or altered in any material aspect.

36 (3) The identity of the perpetrator of the crime was, or should  
37 have been, a significant issue in the case.

38 (4) The convicted person has made a prima facie showing that  
39 the evidence sought to be tested is material to the issue of the  
40 convicted person's identity as the perpetrator of, or accomplice

1 to, the crime, special circumstance, or enhancement allegation that  
2 resulted in the conviction or sentence. *The convicted person is only*  
3 *required to demonstrate that the DNA testing he or she seeks would*  
4 *be relevant to, rather than dispositive of, the issue of identity. The*  
5 *convicted person is not required to show a favorable result would*  
6 *conclusively establish his or her innocence.*

7 (5) The requested DNA testing results would raise a reasonable  
8 probability that, in light of all the evidence, the convicted person's  
9 verdict or sentence would have been more favorable if the results  
10 of DNA testing had been available at the time of conviction. The  
11 court in its discretion may consider any evidence whether or not  
12 it was introduced at trial. *In determining whether the convicted*  
13 *person is entitled to develop potentially exculpatory evidence, the*  
14 *court shall not decide whether, assuming a DNA test result*  
15 *favorable to the convicted person, he or she is entitled to some*  
16 *form of ultimate relief.*

17 (6) The evidence sought to be tested meets either of the  
18 following conditions:

19 (A) The evidence was not tested previously.

20 (B) The evidence was tested previously, but the requested DNA  
21 test would provide results that are reasonably more discriminating  
22 and probative of the identity of the perpetrator or accomplice or  
23 have a reasonable probability of contradicting prior test results.

24 (7) The testing requested employs a method generally accepted  
25 within the relevant scientific community.

26 (8) The motion is not made solely for the purpose of delay.

27 (h) (1) If the court grants the motion for DNA testing, the court  
28 order shall identify the specific evidence to be tested and the DNA  
29 technology to be used.

30 (2) The testing shall be conducted by a laboratory that meets  
31 the FBI Director's Quality Assurance Standards and that is  
32 mutually agreed upon by the district attorney in a noncapital case,  
33 or the Attorney General in a capital case, and the person filing the  
34 motion. If the parties cannot agree, the court shall designate a  
35 laboratory that meets the FBI Director's Quality Assurance  
36 Standards. Laboratories accredited by the following entities have  
37 been determined to satisfy this requirement: the American  
38 Association for Laboratory Accreditation (A2LA), the American  
39 Society of Crime Laboratory Directors/Laboratory Accreditation

1 Board (ASCLD/LAB), and Forensic Quality Services (ANSI-ASQ  
2 National Accreditation Board FQS).

3 (3) If the accredited laboratory selected by the parties or  
4 designated by the court to conduct DNA testing is not a National  
5 DNA Index System (NDIS) participating laboratory that takes or  
6 retains ownership of the DNA data for entry into the Combined  
7 DNA Index System (CODIS), the laboratory selected to perform  
8 DNA testing shall not initiate analysis for a specific case until  
9 documented approval has been obtained from an appropriate NDIS  
10 participating laboratory's technical leader of acceptance of  
11 ownership of the DNA data from the selected laboratory that may  
12 be entered into or searched in CODIS.

13 (i) In accordance with the court's order pursuant to subdivision  
14 (h), the laboratory may communicate with either party, upon  
15 request, during the testing process. The result of any testing ordered  
16 under this section shall be fully disclosed to the person filing the  
17 motion, the district attorney, and the Attorney General. If requested  
18 by any party, the court shall order production of the underlying  
19 laboratory data and notes.

20 (j) (1) The cost of DNA testing ordered under this section shall  
21 be borne by the state or the applicant, as the court may order in  
22 the interests of justice, if it is shown that the applicant is not  
23 indigent and possesses the ability to pay. However, the cost of any  
24 additional testing to be conducted by the district attorney or  
25 Attorney General shall not be borne by the convicted person.

26 (2) In order to pay the state's share of any testing costs, the  
27 laboratory designated in subdivision (h) shall present its bill for  
28 services to the superior court for approval and payment. It is the  
29 intent of the Legislature to appropriate funds for this purpose in  
30 the 2000–01 Budget Act.

31 (k) An order granting or denying a motion for DNA testing  
32 under this section shall not be appealable, and shall be subject to  
33 review only through petition for writ of mandate or prohibition  
34 filed by the person seeking DNA testing, the district attorney, or  
35 the Attorney General. The petition shall be filed within 20 days  
36 after the court's order granting or denying the motion for DNA  
37 testing. In a noncapital case, the petition for writ of mandate or  
38 prohibition shall be filed in the court of appeal. In a capital case,  
39 the petition shall be filed in the California Supreme Court. The  
40 court of appeal or California Supreme Court shall expedite its

1 review of a petition for writ of mandate or prohibition filed under  
2 this subdivision.

3 (l) DNA testing ordered by the court pursuant to this section  
4 shall be done as soon as practicable. However, if the court finds  
5 that a miscarriage of justice will otherwise occur and that it is  
6 necessary in the interests of justice to give priority to the DNA  
7 testing, a DNA laboratory shall be required to give priority to the  
8 DNA testing ordered pursuant to this section over the laboratory's  
9 other pending casework.

10 (m) DNA profile information from biological samples taken  
11 from a convicted person pursuant to a motion for postconviction  
12 DNA testing is exempt from any law requiring disclosure of  
13 information to the public.

14 (n) Notwithstanding any other provision of law, the right to file  
15 a motion for postconviction DNA testing provided by this section  
16 is absolute and shall not be waived. This prohibition applies to,  
17 but is not limited to, a waiver that is given as part of an agreement  
18 resulting in a plea of guilty or nolo contendere.

19 (o) The provisions of this section are severable. If any provision  
20 of this section or its application is held invalid, that invalidity shall  
21 not affect other provisions or applications that can be given effect  
22 without the invalid provision or application.

23 SEC. 2. Section 1405.1 is added to the Penal Code, to read:

24 1405.1. (a) When the ~~Court~~ court grants a motion for DNA  
25 testing pursuant to Section 1405 and a DNA profile of an unknown  
26 contributor is generated, the court may conduct a hearing to  
27 determine if the DNA profile should be uploaded into the State  
28 Index System, and if appropriate, the National DNA Index System.  
29 The court may issue an order directing the upload of the DNA  
30 profile into the State Index System, and if appropriate, the National  
31 DNA Index System, only if all of the following conditions are met:

32 (1) The source of the DNA profile is attributable to the putative  
33 perpetrator of the crime.

34 (2) The profile meets all requirements, whether technical or  
35 otherwise, for permanent inclusion into the State Index System,  
36 and if appropriate, the National DNA Index System, as determined  
37 by the Department of Justice, the Federal Bureau of Investigation,  
38 federal law, and California law.

39 (3) The convicted person or convicted person's counsel provides  
40 written notice to the California Combined DNA Index System

(CODIS) State Administrator at the Department of Justice, the Attorney General, and the District Attorney ~~15~~ 30 court days prior to the hearing to determine if the DNA profile should be uploaded into the State Index System, and if appropriate, the National DNA Index System.

(b) A court shall not order an upload of a DNA profile into the State Index System or the National DNA Index System that violates any CODIS or state rule, policy, or regulation.

SEC. 3. Section 1417.9 of the Penal Code is amended to read:

1417.9. (a) Notwithstanding any other provision of law and subject to subdivision (b), the appropriate governmental entity shall retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for deoxyribonucleic acid (DNA) testing.

(b) A governmental entity may dispose of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set forth below are met:

(1) The governmental entity notifies all of the following persons of the provisions of this section and of the intention of the governmental entity to dispose of the material: any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.

(2) The notifying entity does not receive, within ~~one year~~ 180 days of sending the notification, any of the following:

(A) A motion filed pursuant to Section 1405. However, upon filing of that motion, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.

(B) A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file a motion for DNA testing pursuant to Section 1405 within one year, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

1 (C) A declaration of innocence under penalty of perjury that  
2 has been filed with the court within one year of the judgment of  
3 conviction or July 1, 2001, whichever is later. However, the court  
4 shall permit the destruction of the evidence upon a showing that  
5 the declaration is false or there is no issue of identity that would  
6 be affected by additional testing. The convicted person may be  
7 cross-examined on the declaration at any hearing conducted under  
8 this section or on an application by or on behalf of the convicted  
9 person filed pursuant to Section 1405.

10 (3) No other provision of law requires that biological evidence  
11 be preserved or retained.

12 (c) Notwithstanding any other provision of law, the right to  
13 receive notice pursuant to this section is absolute and shall not be  
14 waived. This prohibition applies to, but is not limited to, a waiver  
15 that is given as part of an agreement resulting in a plea of guilty  
16 or nolo contendere.

17 SEC. 4. If the Commission on State Mandates determines that  
18 this act contains costs mandated by the state, reimbursement to  
19 local agencies and school districts for those costs shall be made  
20 pursuant to Part 7 (commencing with Section 17500) of Division  
21 4 of Title 2 of the Government Code.